for the trustees took an indefeasible fee and there was no provision in the deed of trust for the passing of the title to the land to anyone else upon any contingency. The gift of the land, therefore, was unimpeachable, and the interference of the court could be justified only upon the theory that the trust in the proceeds violated the New York rule against perpetuities. But, as said above, the validity of a trust in personalty should be determined by the law of the domicile of its creator, and as the trust in this case was valid by the law of Massachusetts, it would seem that it should have been sustained.

EFFECT OF THE SURRENDER OF A LEASE.—A well recognized method for the termination of a lessee's interest is by surrender to his landlord.[1] In accordance with general principles of merger this has the effect of utterly destroying the lesser interest, which is swallowed up by the greater reversion.[2] An exception is made, however, when the rights of a third person intervene, and the merger will not be permitted to injure one who has acquired from the lessee an interest connected with the lease. To allow a surrender of a lease to terminate the rights of a sublessee[3] would be obviously inequitable and would open the door to endless fraud and collusion. It was early decided, therefore, that a subtenant retains his interest in the property until it expires either by the terms of his own lease or of that of his immediate lessor.[4] There have been attempts to justify this on grounds of strict logic, on the theory that the subtenant has a vested right which cannot be affected by any merger of interests held by other parties.[5] But at early common law a tenant had nothing more than a contract right against his immediate overlord,[6] and even to-day the subsistence of his interest seems to be totally dependant upon a continuance of the interest under which he holds. An illustration of this proposition is found in the familiar principle that a sublease is ended upon the termination by its terms of the interest of the immediate lessor.[7] Therefore, if the surrender of a lease works the destruction by means of merger, the contemporaneous destruction of all subleases would seem to be a necessary consequence. The true explanation of the continued existence of the sublease probably results in a disparagement of the doctrine of merger; that since this is merely a technical rule of law its operation will not be permitted to injure the rights of the subtenant, and the lease will therefore be regarded as having sufficient

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[1] 2 McAdam, Landlord & Tenant, (4th ed.) § 399. Surrender is either in express terms, or by operation of law, when the parties do some act which implies that they have both agreed to consider the surrender as made, as by making a new lease going into effect before the old one would have expired. 2 Taylor, Landlord & Tenant, (9th ed.) § 507.

[2] 1 Tiffany, Real Property, § 52-*c et seq.*

[3] In the absence of a stipulation to the contrary a tenant may freely sublet. Jones, Landlord & Tenant, § 431.

[4] Mellor *v.* Watkins (1874) L. R. 9 Q. B. 400; Eten *v.* Luyster (1875) 60 N. Y. 252; Mitchell *v.* Young (1906) 80 Ark. 441.

[5] See Krider *v.* Ramsay (1878) 79 N. C. 354; Ritzler *v.* Raether (N. Y. 1881) 10 Daly 286; Pleasant *v.* Benson (1811) 14 East 234; note to Mitchell *v.* Young (Ark. 1906) 7 L. R. A. [N. S.] 221.

[6] Challis, Real Property, (3rd ed.) 425, 426; 1 Tiffany, Real Property, § 36.

[7] 1 Tiffany, Landlord & Tenant, § 162.

continuance for the protection of the sublease.[8] This theory conforms also to those cases which protect the interests of third persons other than sublessees.[9]

Though the rule that a subtenant's right is not destroyed by merger prevails practically everywhere, many jurisdictions have reached an apparently inconsistent result in holding that a surrender by his immediate lessor exempts him from all obligations connected with his lease. The original lessee cannot recover the rent agreed upon, for rent is an incident of the reversion which he has parted with;[10] nor can the landlord enforce its payment, because the reversion to which the rent was incident at the time of the surrender merged in the greater reversion of which he was already possessed.[11] Furthermore, attempts to recover in an action for the reasonable value of use and occupation must be unsuccessful, as was recently held in *Buttner* v. *Kasser* (Cal. 1912) 127 Pac. 811, for this action has, for historical reasons, never been extended to cases where there is no contract, either express or implied in fact.[12] Privity of estate, therefore, is essential as a foundation for the action,[13] and the destruction of the immediate reversion precludes the existence of this requisite element.[14]

Under these technical rules of the common law, therefore, this anomalous situation is presented: a lease is regarded as subsisting for the protection of the subtenant; but as destroyed by the operation of merger when the question is one of his obligation to pay rent.[15] Since such a result is not only illogical, but also manifestly unjust, it seems totally indefensible. If the doctrine of merger is to be departed from in so far as is necessary for the protection of the sublessee, therefore, it would seem that it should be abandoned altogether when the rights and liabilities of a subtenant are concerned. An early English statute provided for this result when the surrender was made for the purpose of acquiring a new lease,[16] and this statute has been re-enacted in

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[8]See 2 Co. Litt. 338-*b;* Davenport's Case (1602) 8 Coke 144; Doe *v.* Pyke (1816) 5 M. & S. 146; Bailey *v.* Richardson (1885) 66 Cal. 416.

[9]Allen *v.* Brown (N. Y. 1871) 5 Lans. 280; Dobschuetz *v.* Holliday (1876) 82 Ill. 371.

[10]Thre'r *v.* Barton (1570) Francis Moore 94; Webb *v.* Russell (1789) 3 D. & E. 393; Grundin *v.* Carter (1868) 99 Mass. 15.

[11]Dartmouth College *v.* Clough (1835) 8 N. H. 22; see Webb *v.* Russell *supra.*

[12]Keener, Quasi-Contracts, 191, 192; 2 Harv. L. Rev. 377 *et seq.*

[13]Kiersted *v.* O. & A. R. R. Co. (1877) 69 N. Y. 343; see Krider *v.* Ramsay *supra;* McDonald *v.* May (1902) 96 Mo. App. 236.

[14]Pleasant *v.* Benson *supra; cf.* Shattuck *v.* Lovejoy (1857) 74 Mass. 204. Dicta to the contrary, see Mitchell *v.* Young *supra;* Eten *v.* Luyster *supra,* may be due to the influence of the early statutes cited in notes 16 and 17 *infra.* The absence of a relation of tenancy is not inconsistent with the line of cases, represented by Peck *v.* Ingersoll (1852) 7 N. Y. 528, holding that a subtenant may pay rent directly to the landowner to prevent his entering for breach of a condition for payment of rent.

[15]The position of the subtenant is thus closely analogous to that of the common law tenant by occupancy; for where land was given to A for the life of B, and A predeceased B, the term remaining until B's death could be taken and held free of all obligation by the first comer. Leake, Property in Land, (2nd ed.) 146, 147; 2 Bl. Comm. 258.

[16]4 Geo. II ch. 28 § 6.

several States.[17] A more recent statute in England provides that any surrender shall cause a subtenant to hold directly from the landlord,[18] and at least one State has reached the same result without legislative assistance, on the ground that there is no merger.[19] In another jurisdiction it has been held that when the lessee along with his surrender makes an assignment of the underlease the subtenant will be liable to the landlord, since the intention of the parties is to sever the rent from the reversion.[20] It is to be hoped that these qualifications upon the common law rule are forerunners of its total abolition in favor of the more logical and equitable view which, while securing the subtenant in his occupation of the land, also protects the reciprocal obligations which he should fairly assume in return for that occupation.

INTENTION AS AN ELEMENT IN THE CREATION OF A FIXTURE.—At early common law the law of fixtures was briefly summarized in the maxim, *Quicquid plantatur solo, solo cedit*[1]. But, like other arbitrary legal rules, this inflexible test proved ill adapted to a developing industrial life, particularly in view of the rapidly increasing importance of personal property, so that there has been a gradual relaxation of the original harsh though simple rule[2]. The modern test of a fixture which has proved most satisfactory and has been most widely adopted is that pronounced in the leading case of *Teaff* v. *Hewitt*[3], which makes the status of an annexed chattel as a part of the realty depend upon three things: actual annexation to the realty, or something appurtenant thereto[4]; appropriation to the use or purpose of that part of the realty with which it is connected; and the intention of the party making the annexation to make the article a permanent accession to the freehold. This intention is to be inferred from the nature of the article affixed, the situation of the person making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made[5]. The marked tendency of the later decisions is to emphasize intention as the predominant factor in the creation of a fixture, and to regard the other elements as subsidiary, valuable chiefly as evidence of the presumable intention of the annexer[6]. As the intention requisite to make a chattel part of

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[17]1 Rev. St. N. Y. 744 § 2; 2 Underhill, Landlord & Tenant, § 709.

[18]8 & 9 Vict. ch. 106 § 9.

[19]See Hessel *v.* Johnson (1889) 129 Pa. 173; see also Kedney *v.* Rohrbach (N. Y. 1886) 14 Daly 54; but see McDonald *v.* May *supra.*

[20]Beal *v.* Boston Car Spring Co. (1878) 125 Mass. 157; *cf.* Brownson *v.* Roy (1903) 133 Mich. 617.

[1]Stillman *v.* Hamer (Miss. 1843) 7 How. 421; Ewell, Fixtures, (2nd ed.) 77.

[2]1 Reeves, Real Property, § 10.

[3](1853) 1 Oh. St. 511.

[4]There may also be a constructive annexation. This exists when the chattel is not physically attached to the realty, but is appropriated to it and is reasonably necessary to its beneficial use and enjoyment. A door key is a good example.

[5]*Cf.* Hopewell Mills *v.* Bank (1890) 150 Mass. 519; Bank *v.* North (1894) 160 Pa. 303.

[6]Barringer *v.* Everson (1906) 127 Wis. 36; Hill *v.* Sewald (1866) 53 Pa. 271; Capen *v.* Peckham (1868) 35 Conn. 88; 7 COLUMBIA LAW REVIEW 1; Ewell, Fixtures, (2nd ed.) 30.